ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

SUPREME COURT NO.: 87,835

4 DCA CASE NO. 94-1049

DAVID R. BEACH and
LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.
_____/

FILED

FILED
SID J. WHITE
JUN 25 1998
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By_____
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PETITION FROM FOURTH DISTRICT COURT OF APPEAL
REPLY BRIEF OF PETITIONERS
DAVID R. BEACH and LINDA M. BEACH

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PREFACE

The Beaches will address the points raised by Great Western's brief in the order and using the headings used by Great Western.

ABBREVIATIONS USED

The Beaches will use the following abbreviations in the brief;

ROA___ ... Record on Appeal, where applicable

TT 1 p. __ l. __ Trial Transcript of February 13, 1995

TILA.....15 U.S.C. 1601, et. seq., commonly referred to as the Federal Truth In Lending Act

old TILA.....Pre-1980 15 U.S.C. 1601, et seq.

new TILA.....TILA after the Simplification and Reform Act of 1980

FRB.....The Federal Reserve Board

Reg Z.....12 C.F.R. 226.01,

O.S.C.....Official Staff Commentary to Reg. Z issued by the FRB

APR.....Annual Percentage Rate of Interest under 15 U.S.C. 1606 & 1638(a)(4)

FC.....Finance Charge under 15 U.S.C.1605 & 1638(a)(3)

AF.....Amount Financed under 15 U.S.C.1638(a)(2)(A)

IAF.....Itemization of Amount Financed under 15 U.S.C.1638 (a)(2)(B)

DS .....Disclosure Statement required under TILA

GW.....Great Western, the Respondent

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE BEACHES RIGHT OF RESCISSION EXPIRED

A. The Unambiguous Language Of Sect. 1635(f)

GW asks this Court to ignore the legislative history of Sect. 1635(f) and only examine 1980 TILA because their brief does not and cannot refute the history of Sect. 1635(f) and Sect. 1640(e) from 1968 to 1995 as presented by the Beaches. Reading Sect. 1635(f) compared to Sect. 1640(e) based only on the 1980 Act and concluding Congress intended to limit rescission to 3 years, as urged by GW, is like reading Act IV Scene V of Shakespeare's Romeo and Juliet and concluding Juliet died from poisoning.

The issue is not whether 15 U.S.C. 1635(f) is ambiguous, but whether 1974 Congress intended to prohibit post limit rescission recoupment defensively. Congress' 1974 intent is not gleaned from reading Sect. 1635(f) in a 1980 vacuum, but by examining its entire history. GW argues the Court need not resort to rules of statutory construction to examine Sect. 1635(f)'s history. GW then supports its argument by resorting to rules of statutory construction to compare Sect.1635(f) [1974] to Sect. 1640(e) [1980].

GW does not rebut the history of Sect.1635(f) and the purpose of the 1974 Act [3 year rescission only to avoid title problems]. Instead, GW cites Russello v. United States 104 S.Ct. 296 (1983) and Leisure Resorts Inc. v Frank J. Rooney, 654 So2d 911 (Fla. 1995) to argue when Congress puts language in one section of a statute and omits it from another section it is generally presumed Congress acted intentionally. GW's presumption argument is flawed.

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Russello p.299 and Leisure p. 913,fn2,3,914 interpreted 18 U.S.C. 1962 & 1963 [Federal RICO] and Fla. Stat. 718.203(1)&(2). Congress passed RICO as a comprehensive statute in 1970 and did not amend either section by 1983 when the Supreme Court wrote Russello. Fla.Stat. 718.203 (1)&(2) were not amended for Leisure. Since the sections were not amended, GW's general presumption has validity for interpreting these statutes at one point in time.

GW's general presumption loses its validity for TILA because Congress passed Sect.1640[1968] with no recoupment and a 1 year limit and Sect.1635[1968] with no limit. Congress amended each section piecemeal at different times to correct different problems, as argued in the Initial Brief, unrebutted by GW. A Court cannot look to TILA in 1980 and presume Congress's intent. A Court must examine each section's history to determine Congress' intent.

GW asks this Court to compare Sect. 1635(f) to 1640(e) as amended in 1980 without examining the history, purpose, or policy of either section. The Beach majority and GW ignore long standing cases that compel Courts to construe particular provisions of a statute by looking to the legislative history of the whole statute, its design as a whole, and to its object and policy, as the Beach dissent did. see Hebering v. New York Trust, 54 S.Ct. 806,808-809 (1934), Crander v. United States 110 S.Ct. 997 (1992).

GW cannot cite one post-1980 pre-Beach case that holds for TILA the statutorily created right doctrine prevents post-limit defensive rescission. GW's cases all hold affirmative actions are barred. None say the claims are barred defensively. The only cases

cited by either party on the subject are pre-1980 TILA damage cases that James v. Home Const. of Mobile, 621 F2d 727 (5th Cir 1980) and Congress in 1980 rejected as wrong, i.e. Devlin v. Aetna Fin. Co. 379 So2d 972 (Fla. 5 DCA 1979) cert.den. 389 So2d 1108 (Fla. 1980).

GW asked the Beaches to cite authority that Congress passed 15 U.S.C. 1640(e) in 1980 to reconcile the split of pre-1980 damage recoupment cases. GW need only read "Truth in Lending" 3rd Edition published by the National Consumer Law Center p. 401 Sect. 8.4:

> "Recoupment and Set Off Are Available in Time Barred Actions."
>
> "In view of this specific congressional authorization, [the 1980 TILA Amendments], the basis for the split of authority on this issue under the prior version of the Act has now been removed," Id. p. 401.

GW does not present one argument or cite one case to explain why Congress passed several TILA amendments after Dawe v. Merchants & Mrtg. Trust Corp 683 P2d 796 (Colo. 1984), FDIC v Ablin, 532 NE2d 379 (Ill.App. 1988), Com. Nat'l Bank & Trust Company v. McClammy 525 N.Y.S.2d 629 (App.Div. 1988), and In Re Shaw, 178 BR 380 (Bkr. N.J. 1994), but never changed 15 U.S.C. 1635 to overrule Dawe.

B. 15 U.S.C. 1635(f) Is Not A Limitation on the Remedy

GW asks this Court to adopt the "statutorily created right doctrine" Congress rejected twice for TILA cases; in 1980 when Congress amended 15 U.S.C. 1640(e) to overrule the Devlin cases, and in 1995 when they added 15 U.S.C. 1635(i)(3) to adopt the Dawe cases. GW agrees Congress rejected the doctrine in 1995 for some states: "The language of Sect. 1635(i)(3) would permit those states to allow rescission rights granted in those particular statutes to be raised defensively beyond three years." [GW Brief p.26]

GW must worship at the altar of the "statutorily created right doctrine" because no other legal doctrine remotely supports their position. James recognized the doctrine as demonic and exorcised the demon for TILA cases: "We see no reason to continue to abide by obsolete judicial dicta which have little relevance to contemporary thought." Id. p.729. Congress exorcised the demon twice, in 1980 and 1995. GW cites no case that rejects James in a TILA context.

GW cannot cite one case that applies the statutorily created right doctrine to a post-limit TILA defense after 1980. GW does not address the unanimous TILA cases cited by Beach that reject the doctrine for post-limit TILA cases after 1980. For example, the Dawe cases, Matter of Coxson 43 F3d 189, 193-194 (5th Cir 1995), Silverman v. Eastrich Multiple Investor Fund, L.P., 51 F3d 28,31-33 (3rd Cir. 1995), F.D.I.C v. Medmark, 897 F.Supp. 511,514 (D.Kan. 1995). Even the Beach majority rejects the doctrine for 15 U.S.C. 1640 damage cases as defenses to suits after 1980.

GW cannot cite one case specifically holding a consumer cannot rescind as an affirmative defense to a lender's foreclosure after 3 years expires. However, another post-Beach opinion rejects Beach and adopts the Dawe cases, the Beach dissent, and Reiter v. Cooper, 113 S.Ct.1213(1993) cases: in re Botelho, 1996 WL 27201(Bkr.D.Mass. 1996). The overwhelming and unanimous case law rejects Beach and supports post-limit defensive rescission. At least 27 judges; 5 Supreme Court Judges (Dawe), 11 intermediate Appellate Judges (Ablin & Westbank 3 each, McClammy 4, and Beach dissent 1) and at least 11 trial Judges, reject GW's arguments. Only 2 Appellate

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judges in the country agree with GW; the Beach majority.

GW cannot cite one case that holds Sect. 1635(f) is a statute of repose or a non-claim statute and not a statute of limitation, as held by the Moore v. Travelers Ins. Co., 784 F2d. 632,633 (5th Cir 1986) cases. GW does not try to argue that TILA rescission is not an issue of Federal Law, as held by the James p. 729 cases. GW simply tries to distinguish the James and Reiter cases by arguing they do not focus on the statutorily created right doctrine.

In Re Smith, 737 F2d 1549 (11th Cir. 1984) and the Reiter cases do not use the statutorily created right doctrine because James rejected it several years earlier. The modern post-James cases do not abide by obsolete judicial dicta which have little relevancy to contemporary thought. James fn 2 holds it is revolting to have no better reason for a rule than that it was promulgated under the reign of Henry IV. GW argues no better reason to adopt it for post-limit TILA rescission defensively except it was used in a few cases that do not even address whether rescission can be raised defensively, and James and Congress overruled as wrong for TILA.

GW's case, King v. State 784 F2d 910 (9th Cir 1986) supports the Beaches: "Third, the three year bar on rescission actions in Section 1635(f) begins at the "consummation of the transaction or the sale of the property whichever occurs first," so at least in the rescission context, Congress did not intend to prolong the limitations period under a continuing violation theory." Id. p.914. [emph. added]. King holds: the 9th interpreted Sect. 1635(f) only under a continuing violation theory, not as a post-limit defensive

rescission; King treats 15 U.S.C.1635(f) not as a non-claim statute or statute of repose but a statute of limitation.

C. State Law Does Not Support The Application of Recoupment

15 U.S.C. 1635(i)(3) does not limit post-3 year recoupment to state law, but: 1) shows Congress' intent not to bar recoupment; and 2) allows post limit recoupment when raised as a foreclosure defense. Sect.1635(i)(3) when read with Beekner v L.P. Kaufman Inc. 198 So 794 (Fla.1940), Rybovich Boat Works v. Atkins 585 So2d 270, 272(Fla.1991), Allie v. Ionata, 503 So2d 1237,1240 (Fla. 1989), and the floor comments allow post limit recoupment under Florida law.

GW does not refute the policy concerns of usury and TILA are identical. Instead, GW tries to distinguish the Beekner cases by genuflecting to the statutorily created right doctrine again. GW does not refute the Beaches' argument that Federal Law controls, nor does GW cite one Florida case applying the statutorily created right doctrine to bar post-limit claims defensively by recoupment. GW even agrees Sect. 1635(i)(3) preserves recoupment for consumers in state court. [GW brief p.25-26].

Allie allows post-limit rescission defensively and gives the defendant a positive recovery. The Beach dissent correctly read Allie in light of Williams v. Homestake Mrtg. Co., 968 F2d 1137, 1140 (11th Cir.1992). Williams points out TILA adopted common law rescission to remedy wrong disclosure and only reorders the steps necessary to effect rescission. Since Allie allows a common law post-limit claim defensively and TILA rescission only reorders the common law rescission process, it makes sense that Allie allows

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post-limit TILA rescission claims defensively under state law.

D. Applying Recoupment Would Constitute a Penalty

GW argues wrongly that usury causes actual harm to a consumer while TILA errors cause no harm to consumers. TILA presumes actual harm to the individual consumer because he could not compare the costs of credit and shop for the best credit terms available. in re Norris, 138 BR 467,472 (E.D.Pa. 1992), Dzadovsky v Lyons Ford Sales Inc., 593 F2d 538,539 (3rd Cir. 1979).

Although GW claims minor errors, they did not cross appeal the Trial Court findings. GW's witness testified GW's payment schedule wrong by $.58. [trial opinion p.8-11]. GW improperly disclosed the monthly payment which made the disclosed FC and ToP wrong. The Court found GW's APR wrong, but within TILA's tolerance. GW also erred by the DS use of estimates. [trial opinion p. 12]. TILA deems the APR, the FC, the AF the ToP and the Payment Schedule material. Reg Z 226.23 fn 48. GW misstated every material disclosure and one more non-material error [use of estimates].

The Beaches correctly predicted GW would cry an unfair penalty and consumer windfall. GW does not dispute Congress would sanction and applaud the result to GW had the Beaches defaulted after 359 payments. GW simply says it is unfair because they are penalized and the Beaches get a windfall. Congress intended windfalls when it passed 15 U.S.C. 1635 [1968] Griggs v Provident Cons Disc. Co., 680 F2d 927,933 (3rd Cir. 1982) and rescission is not a penalty.

Sect. 1640(a) damages are penalties, but, as pointed out in the Beaches Brief and unrebutted by GW, Congress designed TILA

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rescission to protect consumers who risk their homes to foreclosure based on the terms disclosed and to encourage lenders to properly disclose. Just because GW cannot realize a profit on a loan when they misdisclose does not make TILA rescission a penalty. TILA penalizes lenders only if they do not properly rescind.

GW does not rebut the argument that Congress passed the 3 year limit only to clear property titles and Congress was not concerned with the monetary result of a post 3 year rescission on a lender when they passed 15 U.S.C. 1635(f). Congress would approve the monetary result on GW, who does not, and cannot cite the result on a lender as a basis to add the 1974 3 year limit.

GW could have easily agreed to rescind. Instead GW chose to fight. McGowan v. King Inc., 661 F2d 48,50 (5th Cir 1981) in the context of a fee award noted nothing requires defendants to yield an inch or pay a dime, but they may by militant resistance if unsuccessful, be required to bear the cost. GW, by their militant resistance and their failure to present any evidence to support equitable conditioning, brought about the Beach's right to claim vesting of principal under Williams, Sect. 1635(b), Reg Z 226.23 (d)(3) and O.S.C. 226.23(d)(3). GW hoist themselves on their own petard and they should not now be heard to complain.

E. The Dawe Rationale

Although modern banking practices may prevent bankers from holding loans for 2-3 years, bankers could easily hold loans for 2 or 3 months before suing to foreclose. If a consumer defaulted after 34 months and the lender sent the TILA violative mortgage to

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a lawyer to foreclose, the lawyer would have to tell the lender to comply with 15 U.S.C.1640(b), give the consumer a correct TILA DS and correct rescission notice. The lawyer would tell the lender the consumer in default would likely rescind to prevent foreclosure.

The lawyer would tell the lender if the consumer rescinded and the lender complied with Sect. 1635(b) and Reg. Z 226.23(d), the lender would have to cancel the mortgage and return 34 mortgage payments, late charges and all closing costs. If the lender asked the lawyer what would happen if he did not foreclose, the attorney would have to tell the lender under Beach, if he did not foreclose for 3 more months, the consumer could never rescind. The lender would then only expose himself to Sect. 1640(a) damages and payment of fees to the consumer's lawyer, assuming the consumer sought out a lawyer. Such a scene, ignored by the Beach majority and GW [and extremely likely] would encourage the lender to hold the loan until month 37 to sue, and encourage non-compliance with Sect. 1640(b).

GW's claim that a consumer would risk his home to foreclosure along with his good credit rating in the hopes of finding a judge to order a TILA rescission is absurd. The Beach result shows no logic or advantage to such a strategy for the consumer.

GW no doubt misreads Gillis v. Fisher Hardware Co., 289 So2d 451 (Fla. 1 DCA 1974) to argue "[the 1st DCA agreed] to bar the appellant's affirmative defenses and counter claim for rescission under TILA since more than 1 year had passed from the consummation of the transaction." [GW Brief p.23]. Gillis did not bar the TILA rescission claim, but held summary judgment not appropriate because

issues of fact existed: "We agree with the trial court that there was sufficient conflicting evidence as to the circumstances involving the notice of right to rescind so as to deny a motion for summary judgment based thereon." Id. p. 452.

F. The TILA Amendments of 1995

The Beach dissent recognized Sect. 1635(i)(3) [1995] either adopted Dawe, is silent on Dawe or overruled Dawe and correctly reasoned Sect. 1635(i)(3) adopted Dawe. If Sect. 1635(i)(3) adopted Dawe this Court must reverse Beach because Sect. 1635(i)(4) applied it to all loans. Even if Sect. 1635(i)(3) is silent on the subject, Congress' rejection of the House Banking Committee's proposed March Amendment, Blau v. Lehman, 82 S.Ct. 451, 456-457 (1962) [amending sections of TILA while not amending 15 U.S.C. 1635 after Dawe shows Congress adopted Dawe], and T.I.M.E. Inc. v. United States, 97 S. Ct. 904,912 (1959) [Congress allows post limit defensive rescission since they were asked but refused to pass an absolute bar] compel this Court to reverse Beach. GW does not argue or cite 1 case to refute Blau, T.I.M.E., or the Beach's arguments on this point.

The only way this court can affirm Beach is if 15 U.S.C. 1635 (i)(3) overrules Dawe and specifically bars post-limit rescission defensively. Even GW does not have the audacity to argue 15 U.S.C. 1635(i)(3) specifically overrules Dawe. GW agrees it adopts Dawe:

> "The language of Sect. 1635(i)(3) would permit those states to allow rescission rights granted in those particular statutes to be raised defensively beyond three years." [GW Brief p.26 emphasis added]

GW's arguments do not withstand logical analysis. If Sect. 1635(i)(3) only impacts common law rescission, why did Congress not

limit it to a consumer's common law right to rescind? If Sect. 1635 (i)(3) permits states with parallel TILA statutes to allow post-limit defensive rescission then Congress by Sect. 1635(i)(3) had to reject the statutorily created right doctrine. If Sect. 1635(i)(3) allows consumers under parallel state TILA laws to raise post-limit defensive TILA rescission, it cannot bar post-limit rescission when a consumer relies on the Federal TILA in Florida as shown below.

15 U.S.C. 1635(i)(3) states: "Nothing in this sub-section affects a consumer's right of rescission in recoupment under State Law." GW agrees 1635(i)(3) does not impact common law rescission. Nothing in the sub-section suggests it is limited to a state's statutory law as opposed to a state's case law, especially since GW concedes the sub-section does not affect a state's common law:

> "the addition of 15 U.S.C. 1635(i)(3) concerning the right of recoupment under state law does nothing more than recognize that the amendments to Sect. 1635 do not impact common law rescission rights available under separate state laws." (GW Brief p. 25 emphasis added).

GW agrees Florida common law, the state's law under Sect. 1635 (i)(3), permits defensive post-limit rescission [Beekner cases]. Hence, under GW's logic, Sect. 1635(i)(3) must allow post-limit rescission for Florida since the state law, Allie and Rybovich, allows post limit rescission recoupment, the subsection does not affect Florida's common law, and TILA only reorders common law rescission as pointed out by Williams and the Beach dissent and unrebutted by GW.

GW concedes Congress' 1995 amendment; adopted Dawe for some states, did not specifically overrule Dawe [how could it both adopt

and overrule Dawe], and the undisputed history of Sect. 1635(i)(3) show Congress rejected overruling Dawe. The Beach dissent correctly reasoned Dawe controls. If Sect 1635(i)(3) allows recoupment post-limit defensively for at least some states, it cannot possibly adopt the statutorily created right doctrine for other states.

As predicted, GW relies on certain legislator's floor comments and a committee report on a bill not adopted by Congress to support their position. The Beaches rely on their Initial Brief to rebut these points, and point out that the history of Sect. 1635(i)(3) shows GW is trying to get by judicial fiat what they could not get through Congress despite the best efforts of their lobbyists.

II. THE BEACHES ARE NOT ENTITLED TO ADDITIONAL RELIEF

This court is not limited to review only the certified question, but any issue properly preserved and presented. Reed v. State, 470 So2d 1382 (Fla. 1985), Tillman v. State, 471 So.2d 32 (Fla. 1985). The Beaches brief to the 4th District argued "Under Yslas v. D.K. Gunther 349 So2d 1259 (Fla. 2 DCA 1976), Great Western loses the right to collect principal." and preserved this issue for review.

A. Rescission And The Right To Collect Principal

GW does not dispute they must show equitable facts exist to alter TILA rescission and concede the record contains no evidence that justify equitable conditioning. If the record had evidence for equitable conditioning GW would not ask for a new trial. GW asks for another bite of the apple to present equitable conditioning factors. They are not entitled to another trial.

B. The Beaches Are Not Entitled to Multiple Statutory Damages

Hubbard v. Fidelity Federal Bank, 824 FSupp 909,917-919,921 (C.D.Cal. 1993) cites Brown v. Marquette Savings & Loan 686 F2d 608 (7th cir. 1982) and Nash v. First Financial 703 F2d 233 (7th Cir. 1982) and holds when GW misstates the variable feature, and either increases the interest from the initial rate or adds a variable feature to the obligation under O.S.C. 226.20(a)(3) each results in a new claim for damages and begins a new statute of limitation.

A lender can add any number of "variable features" to the obligation. Hubbard fn 12 and O.S.C. 226.19(b)(2)-2 holds the interest rate, payments and loan balance are loan features that a lender may add to the consumer's obligation. GW agreed, the lower Court found, and GW did not appeal the finding they understated the composite variable discounted feature by the $.58 payment schedule error. Hence, GW added 3 variable features: 1) more interest [FCs], 2) larger monthly payments [the payment schedule], and 3) a larger loan balance [the ToP] at each rate change than the interest, payments and loan balance originally disclosed to the Beaches.

GW does not dispute that they increased the interest within 3 years of the Beaches rescission and that no evidence exists they sent a new DS at the rate increase. Hubbard p.919 fn 12 and O.S.C. 226.19(b)(2)-2 rejects GW's claim the FRB limited the new comment to a case where the lender made no variable disclosures and then makes the loan variable. Nash p.239 and Hubbard p. 921 address the conceptual problem of "consummation of a new transaction" when the lender unilaterally changes the rate based on the note terms which were not disclosed. Hubbard recognized if the lender changed the

rate as per the note, there could be no breach of contract claim, but there was a TILA variable rate misdisclosure.

Humphrey's operative limitation expired for pre-July 1 1991 events and p.921 and fn 14 tells us the pre-1991 events were rate decreases from the original rate and the previous rate change. This is why Hubbard found no liability as to Humphrey. Hubbard p.918 found that the lender did not violate Reg Z 226.17(c)(1) because the lender did not adjust Hubbard's loan inconsistent with the initial disclosure within 1 year of Hubbard's suit. The Hubbard limitation expired for pre July 1, 1991 events. Hubbard paid off the loan on July 1, 1991 so a new limitation period never began.

Humphrey had valid claims under Reg Z 226.17(c)(1) and Reg Z 226.20 because the lender changed the rate consistent with the note and inconsistent with the disclosures before 1991. The lender corrected the errors for Humphrey after 1991; it did not change the method to adjust the interest and the interest rate decreased from the original rate and the last rate so Humphrey had no timely claims. Hubbard p.921.

The Beaches interest rate began at 8.750% in 1986 and changed as follows: 4/1/87-8.35%, 10/1/87-8.850%, 4/1/88-8.710%,, 10/1/88-8.710%, 10/1/88-9.210%, 4/1/89-9.710%, 10/1/89-10.210%, 4/1/90-10.270%, 10/1/90-10.320%, 4/1/91-9.820%, 10/1/91-9.32%. The Beaches rescinded by their June 26, 1992 affirmative defense. GW raised the interest from the original rate and each previous rate on 10/1/89, 4/1/90, and 10/1/90, all within 3 years from the Beaches rescission affirmative defenses. Each rate increase added a variable feature

by increasing the monthly payment, the interest and total of payments required and disclosed by the variable note and TILA DS. Under Brown, Nash, Hubbard, Reg Z 226.17(c), 226.19(b)(1), 226.20 and the Staff Comments GW increased the variable interest and added a variable feature not disclosed to the consumer. Hence, each rate change began a new limitation and the rescission claim is timely.

Under 15 U.S.C. 1640(a) [1995] the Beaches are entitled to $2,000.00 statutory damages for each rate change because each change is a new transaction and the Beaches timely rescinded from the last increase. The Court need not get to the 3 year issue.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to: Steve Ellison, Esq., Broad and Cassel, 400 Australian Ave. S., Fifth Floor, West Palm Beach, FL 33401 this 17th day of June, 1996.

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